

November 24, 2003

BY OVERNIGHT DELIVERY

96-128

Marlene H. Dortch, Secretary
Federal Communications Commission
Office of the Secretary
9300 East Hampton Drive
Capitol Heights, MD 20743

Re: Dunkirk and Fredonia Telephone Company
Petition for Waiver of Default Payphone Compensation Requirements
Under Sections 64.1301(a),(d) and (e).

Please find enclosed for filing the original and 4 copies of Dunkirk and Fredonia Telephone Company's ("DFT") Petition for Waiver of Sections 64.1301(a), (d) and (e).

Also enclosed is an additional copy of this cover letter marked for STAMP AND RETURN in the enclosed self-addressed stamped envelope.

Should you have any questions regarding this matter, please call the undersigned at 716-673-3031.

Sincerely,

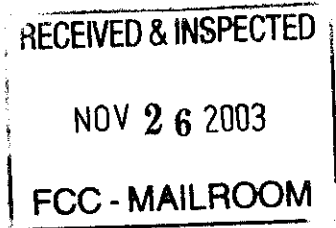
A handwritten signature in cursive script, appearing to read 'William R. Westin'.

William R. Westin
VP Industry Affairs

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Where communication takes flight

**Before the
Federal Communications Commission
Washington, D.C. 20554**



In the Matter of)	
)	
Implementation of the)	
Pay Telephone Reclassification and)	CC Docket No. 96-128
Compensation Provisions of the)	
Telecommunications Act of 1996)	

PETITION FOR WAIVER OF SECTIONS 64.1301(a), (d) AND (e)

Dunkirk and Fredonia Telephone Company, ("Petitioner"), pursuant to Section 1.3 of the Federal Communications Commission's ("FCC" or "Commission") Rules¹, hereby requests a waiver of Sections 64.1301(a), 64.1301(d) and 64.1301(e) of the Commission's Rules² to exclude Petitioner from the requirement to pay default compensation to payphone service providers. Because Petitioner is an incumbent local exchange carrier ("ILEC"), it inappropriately appears that it is subject to the requirements under Section 64.1301 to pay default compensation to payphone providers for compensable calls because of the presence of "ILEC" on Appendices A, B and C of the Commission's *Fifth Reconsideration Order* in CC Docket No. 96-128.³ Because Petitioner does not carry compensable calls, Petitioner believes that "ILEC" as included on Appendices A, B and C does not apply to it. Petitioner hopes that the Commission

¹ 47 C.F.R. § 1.3.

² 47 C.F.R. §§ 64.1301(a), 64.1301(d) and 64.1301(e).

³ *Implementation of the Pay Telephone Reclassification and Compensation Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-128, *Fifth Order on Reconsideration and Order on Remand*, FCC 02-292 (Rel. Oct. 23, 2002) (*Fifth Reconsideration Order*).

will clarify this matter, either on its own motion or in response to the petitions of others in the industry. In the interim, petitioner herein respectfully requests that the Commission waive the requirement under Sections 64.1301(a), 64.1301(d) and 64.1301(e) of the Commission's Rules for Petitioner to make default payments to payphone service providers.

Petitioner is an incumbent local exchange carrier (ILEC) serving approximately 10973 access lines in New York State. On August 29, 2003, Petitioner received a letter and invoice from APCC Services, Inc. ("APCC"). Said letter indicates that APCC is rendering an invoice to Petitioner for payphone compensation owed to the payphone service providers ("PSPs") pursuant to the Commission's "True-Up Order" (*Fifth Reconsideration Order*).

- 1. A key determination by the Commission regarding compensable calls is that an ILEC must carry a call in order to be responsible for payment.**

The *Fifth Reconsideration Order* was intended to bring a "measure of finality" regarding the contentious history of payphone compensation. One purpose of the Commission's action was to ensure that payphone service providers (PSPs) receive fair compensation for every call made using their payphones. The Commission has concluded that Section 276 requires it to "ensure that per-call compensation is fair, which implies fairness to both sides."⁴

In pursuit of this objective and a fundamental criterion to the Commission's rules regarding payphone compensation was to ensure that local exchange carriers ("LECs") "pay payphone compensation to the extent that they handle compensable payphone

⁴ *Fifth Reconsideration Order*, at 82.

calls.”⁵ This is a threshold criterion that must be satisfied prior to placing a burden for PSP payment on any LEC. Absent satisfying this threshold criterion, a carrier would be responsible to pay for a compensable call that it did not handle. Clearly such result would not be a fair result for the LEC.

The Commission explained how a LEC can handle compensable communications.

- a. When a LEC terminates a compensable call that is both originated within its own service territory and not routed to another carrier for completion,
- b. When a LEC also provides interexchange service and carries the call as would any other IXC.

2. The Commission’s default payphone compensation regime for ILECs is based exclusively on RBOC data that does not reflect Petitioner ’s lack of compensable calls.

Based on at least two data requests initiated by the Commission and directed solely to the RBOCs, the Commission determined that incumbent LECs complete payphone calls that are not routed to other carriers. The RBOC data apparently shows that 2.19 percent of all compensable payphone calls are handled by the RBOCs. The Commission also noted that no other incumbent LEC objected to this data. The Commission concluded that it is appropriate to allocate to “both RBOC and non-RBOC incumbent LECs a percentage of the calls (2.19%) originating from payphones within their own service territories.” Petitioner did not have cause to object to this data because clearly the Commission was directing its efforts at determining the percentage for “carriers” – those entities who carry compensable communications. As will be shown

⁵ *Fifth Reconsideration Order*, at 55 (Emphasis supplied).

below, Petitioner does not carry any compensable calls. Thus the application of the allocation percentage in the case of Petitioner is inappropriate.

3. Petitioner never carries compensable calls.

A compensable call is defined by the Commission as a call from a payphone user who calls a toll-free number, dials an access code, or uses a pre-paid calling card without placing any money into the payphone.⁶ Because of its operation as an access provider, Petitioner does not carry any compensable communications. All compensable calls originating from payphones within the Petitioner service area are passed on to other carriers who pay interstate or intrastate, as the case may be, originating access charges. Any compensable calls terminated by Petitioner within its service area are received from other carriers who pay interstate or intrastate, as the case may be, terminating access charges. Thus, Petitioner does not carry individual compensable calls that both originate and terminate within Petitioner's LEC service area or are carried by Petitioner as an IXC that are subject to compensation under the criteria established in the *Fifth Reconsideration Order* for either a LEC or an IXC.⁷ Any compensable call terminating in Petitioner's service area would have to be an IXC-carried call. Assuming that Petitioner handles compensable calls and requiring it to pay for compensable calls that it never handles is not a fair compensation mechanism.

4. The Fifth Reconsideration Order provides a mechanism for entities to be removed from the allocation percentage appendices.

⁶ *Fifth Reconsideration Order*, at 3.

⁷ *Id.*, at 55.

Appendices A, B and C of the *Fifth Reconsideration Order* list “carrier” allocation percentages for default compensation factors for, respectively, interim access code and subscriber 800 calls (November 7, 1996 through October 6, 1997), intermediate access code and subscriber 800 calls (October 7, 1997 through April 20, 1999) and post-intermediate access code and subscriber 800 calls (April 21, 1999 forward). In the *Fifth Reconsideration Order*, the Commission noted that entities listed on Appendices A, B, or C could file a petition for a waiver with the Wireline Competition Bureau – such as the instant waiver request – for exclusion from the Commission’s allocation. Note 89 states:

... Any entity named in our allocation that then receives a request for per payphone compensation from a PSP or other entity may, within ninety (90) days of receiving such a request, file a waiver request with the Wireline Competition Bureau for exclusion from our allocation, with a demonstration that the entity provides no communications service to others.⁸

As has been demonstrated above, while Petitioner provides communications services, it never provides compensable communications service to others and is a non-carrier as defined by the *Fifth Reconsideration Order*.⁹ Accordingly, Petitioner requests within 90 days of receipt of its only request for compensation, that from APCC, that it be removed from the Commission’s allocation appendices.

⁸ *Fifth Reconsideration Order*, Note 89.

⁹ *Id.*, Note 3.

5. Petitioner's petition for waiver meets the Commission's standards for granting a waiver of its rules.

Under section 1.3 of the Commission's Rules, any provision of the rules may be waived if "good cause" is shown. The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest if applied to the petitioner and when the relief requested would not undermine the policy objective of the rule in question.¹⁰ Payment of payphone compensation by Petitioner absent compensable calls that both originate and terminate within Petitioner's network, whereby Petitioner does not collect any revenue for the call, apart from revenue under the applicable interstate or intrastate access charge regime, would be inconsistent with the public interest. Additionally, payment of compensation under such circumstances would undermine the policy that entities benefiting from the carrying of compensable payphone originating calls should pay compensation to payphone providers. Moreover, it would be burdensome and inequitable for Petitioner and, in turn, its customers to bear the cost of default payment compensation when Petitioner carries no compensable calls.¹¹

¹⁰ Wait Radio v. FCC, 418 F.2d 1153 (D.C. Cir. 1969), cert. denied, 409 U.S. 1027 (1972) ("WAIT Radio"); Northeast Cellular Telephone Co. v. FCC, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

¹¹ See Wait Radio, 418 F.2d at 1159. The petitioner must demonstrate, in view of unique or unusual factual circumstances, application of the rule(s) would be inequitable, unduly burdensome, or contrary to the public interest.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Commission waive Sections 64.1301(a), 64.1301(d) and 64.1301(e) and thereby not include Petitioner among the entities listed on Appendices A, B and C of the *Fifth Reconsideration Order* required to pay default compensation to payphone service providers. The requested waiver will serve the public interest by allowing Petitioner to avoid payment of charges for which no related benefit accrues to Petitioner given that Petitioner does not carry payphone originated compensable calls.

Respectfully submitted,

Dunkirk and Fredonia Telephone Company

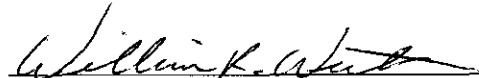
By:

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November 24, 2003

DECLARATION OF WILLIAM R. WESTIN

I, William R. Westin, Vice President of Industry Affairs of Dunkirk & Fredonia Telephone Company do hereby declare under penalties of perjury that the information contained in the foregoing "Petition for Waiver" is true and accurate to the best of my knowledge, information and belief.


William R. Westin
Dunkirk & Fredonia Telephone Company

Date: November 24, 2003